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No. 90-851

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

CHARLES B. CARROLL,

Petitioner,

against

INSURANCE COMPANY OF NORTH AMERICA,

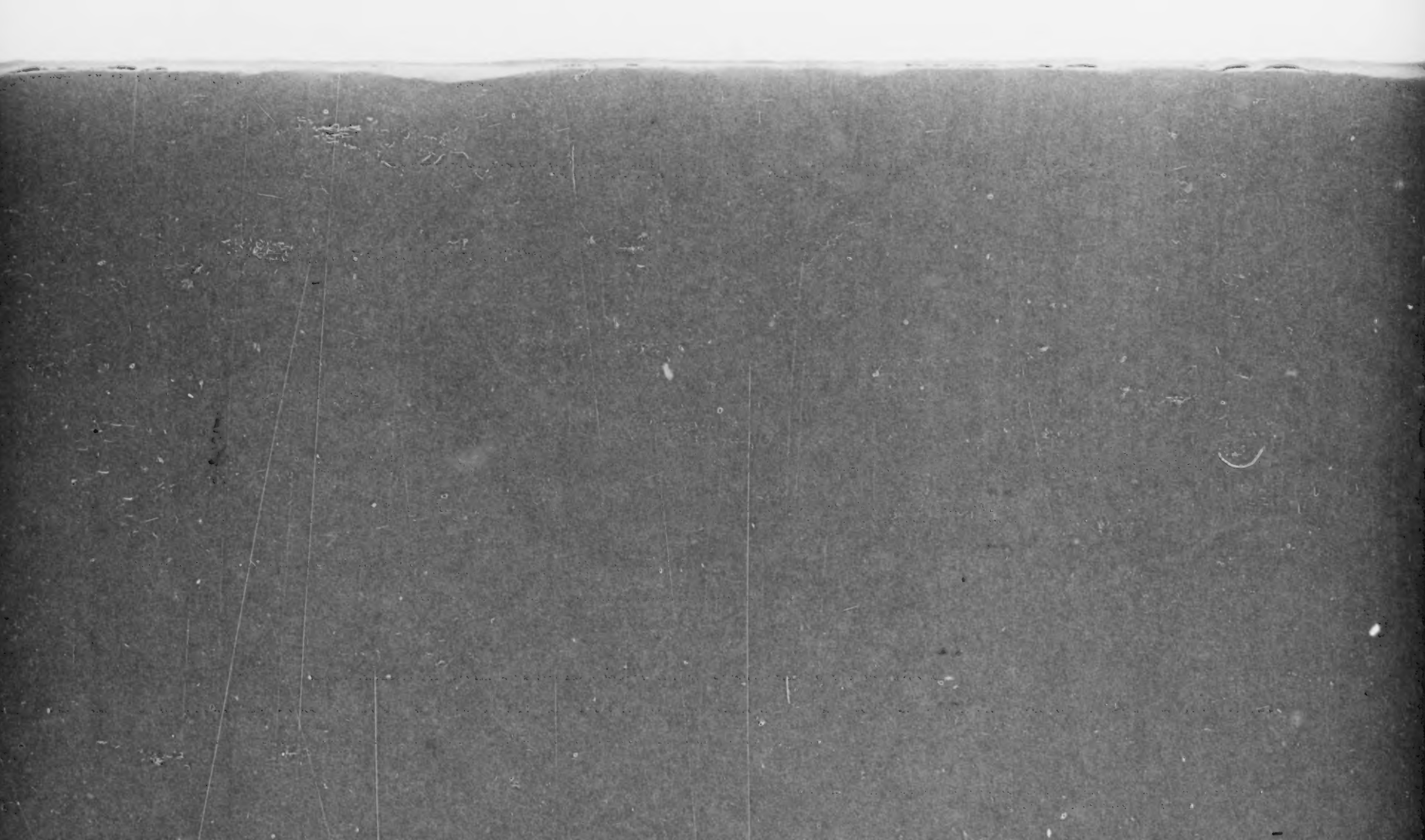
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Susan J. Rebeck
104 Fourth Street North, Suite 301
Post Office Box 2720
Great Falls, Montana 59403-2720
(406) 727-8400

Counsel for Respondent



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COMES NOW, Respondent, Insurance Company of North America to set forth the following arguments and authorities in opposition to the petition for writ of certiorari filed herein by Charles B. Carroll.

STATEMENT OF THE CASE

Some clarification of petitioner's statement of the case is required. This case involves an appeal of the district court's order of dismissal pursuant to Fed. R. Civ. P. 37(b)(2)(c) for petitioner's failure to

respond to discovery requests.

The predecessor case began as an action brought by petitioner (hereinafter referred to as "Carroll") against his employer for wrongful termination of his employment. Respondent, Insurance Company of North America[1], (hereinafter referred to as "INA") was the insurer for Carroll's employer. INA provided a defense for its insured in the wrongful termination case. INA specifically reserved its right to deny coverage.

Based on a Confession of Judgement executed by Carroll's employer on January 22, 1987, judgment in the amount of $125,000.00 was entered in favor of Carroll. Carroll sought to have the judgment paid by INA. INA denied liability for the judgment based on the coverage questions which had been reserved by INA.

On March 18, 1987, Carroll filed a

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1. Insurance Company of North America is a subsidiary of Cigna Corporation.

complaint with the United States District Court for the State of Montana seeking to enforce payment of the judgment. On June 2, 1987, INA filed its answer, a counterclaim against Carroll seeking declaratory judgment, and a third party complaint against its insured seeking to bind the insured to the declaratory ruling.

On July 27, 1987, INA served discovery requests on Carroll designed to elicit evidence to prove that Carroll's judgment was not covered by the terms and conditions of the employer's insurance policy.

Carroll's answers to the discovery requests were due on August 26, 1987. INA agreed to an extension of time for Carroll to respond to discovery. By order dated September 4, 1987, the court granted Carroll until September 25, 1987, to respond. A pretrial conference was held on September 23, 1987. At that time INA advised the court that it intended to move for summary judgment as soon

as Carroll responded to its discovery requests.

As a result of the pretrial conference, the court issued an order setting April 18, 1988, as the date for completing all discovery. On October 26, 1987, one month after Carroll's responses were due, INA received evasive and inadequate responses to its discovery requests. Carroll argued that information from the wrongful termination case was not discoverable in the declaratory judgment action.

By letter dated November 12, 1987, INA's counsel urged Carroll to provide adequate responses by November 18, 1987. Having received nothing by November 20, 1987, INA filed a motion requesting a discovery conference or in the alternative an order compelling Carroll to respond to INA's discovery requests. Carroll failed to respond to INA's motion, and by order dated December 16, 1987, the court granted INA's motion to

compel. Carroll was ordered:

> to provide full and complete information to INA's interrogatories, requests for production and requests for admission.

By the April 18, 1988, discovery deadline Carroll had not complied with either the court's order concluding discovery or with the court's order compelling discovery. Instead, on April 19, 1988, Carroll served discovery requests on INA. On April 25, 1988, INA filed a motion to dismiss for failure to prosecute, and Carroll filed a motion for summary judgment. INA moved to continue the determination of Carroll's motion for summary judgment based on Carroll's failure to respond to INA's discovery requests.

On May 13, 1988, the action was stayed when the third party defendants filed bankruptcy. The stay was lifted on July 20, 1988. A hearing on the various pending motions was scheduled for September 9, 1988. On September 7, 1988, Carroll served amended discovery responses on INA that reiterated

Carroll's objection to providing information from the underlying wrongful termination case.

On December 8, 1988, the district court issued its memorandum and order dismissing Carroll's complaint pursuant to Rule 37(b)(2)(c) of the Federal Rules of Civil Procedure. On April 20, 1989, after a rehearing, Carroll's motion for reconsideration was denied.

On August 16, 1990, the Court of Appeals for the Ninth Circuit affirmed the district court order dismissing the complaint and on September 11, 1990, denied Carroll's petition for rehearing.

Summary of Argument

Carroll has failed to present any special or important reasons warranting a grant of certiorari.

The instant case has never been decided by the Montana Supreme Court.

Carroll has not presented a federal question that has not already been settled by

this Court.

There is no conflict between the circuits which justifies homogenization of the discretionary functions of the district courts relative to applications of Rule 37(b)(2)(c) sanctions.

Argument

A writ of certiorari is granted only when there are special and important reasons for doing so. While the Court may exercise wide discretion when considering certiorari, Sup. Ct. Rule 10.1 indicates the character of reasons which will be considered in supporting a petition for certiorari:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of

> another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by the Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The considerations of Sup. Ct. Rule 10.1(b) simply do not apply in this case. Carroll makes no showing that the instant case has ever been decided by the Montana Supreme Court.

Sup. Ct. Rule 10.1(c) does not apply since Carroll has not presented a federal question that has not already been settled by this Court. Due process considerations relative to discovery sanctions were settled by this Court in National Hockey League v. Metropolitan Hockey Club 427 U.S. 639, 49 L.Ed 2d 747, 96 S. Ct 2778 (1976).

> [W]e hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' "flagrant bad faith" and their counsel's "callous

disregard" of their responsibilities. Id. at 643.

In Falstaff Brewing Corp. v. Miller Brewing Co. 702 F.2d 770, 782 (9th Cir. 1983) the Court of Appeals for the Ninth Circuit summarized the principle set forth in National Hockey:

> National Hockey stands for the principle that a court may dismiss an action pursuant to Rule 37, in accordance with due process, when the facts show that a plaintiff willfully or in bad faith fails to obey a discovery order.

In the instant case the district court found that the actions of Carroll were willful, deliberate and "contumacious."[2] Therefore, based on National Hockey, it was within the discretion of the district court to dismiss the complaint.

Carroll seeks a writ of certiorari under Sup. Ct. Rule 10.1(a) arguing that sanctions imposed by the federal district court and affirmed by the Court of Appeals for the Ninth

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2. Memorandum Opinion and Order at pages 23 and 24 of Exhibit A in the Appendix to the Petition for Writ of Certiorari.

Circuit were not warranted and were in conflict with prior decisions by the appellate court.

Carroll argues that INA was not prejudiced by Carroll's failure to respond to INA's discovery requests. Yet more than 16 months passed between the service of discovery requests on July 27, 1987, and the December 8, 1988, order of dismissal. As the court said in Ash v. Cvetkov, 739 F.2d 493, 496 (9th Cir. 1984), "[u]nreasonable delay creates a presumption of injury to the defense." In the order of dismissal the district court judge found prejudice:

> This complete and willful failure to provide discovery responses has been extremely prejudicial to defendant, since its ability to move for summary judgment has been hampered by the lack of a factual foundation upon which to base its argument.[3]

In Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986) the court found that plaintiff's counsel disregarded repeatedly the

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3. Id. at 22

deadlines set by the district court. In the December 8, 1988, order herein, Judge Battin wrote:

> In the present case, [Carroll] has completely failed to comply with defendant's legitimate discovery requests, despite defendant's urging and two Orders of this Court compelling him to do so.[4]

Relying on Malone v. United States Postal Service, 833 F. 2d 128 (9th Cir. 1987), Carroll contends that the district court had a duty to warn Carroll before using Fed. R. Civ. P. 37(b)(2)(c) to dismiss the complaint. This is not an accurate statement of the law.

The Malone case is only one of many circuit court cases justifying or rejecting Rule 37(b)(2)(c) sanctions. The Malone court at 133 noted that the so-called "duty to warn" was "frequently ... a contributing factor" in reversing orders of dismissal. Malone did not impose a mandatory duty, and there is no reason for doing so on a nationwide basis.

Requiring a duty to warn before imposing

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4. Id. at 20

Rule 37 sanctions would be an unwarranted intrusion on the discretionary functions of the district courts. If "ignorance of the law" is no excuse for non-attorney citizens, then ignorance of Rule 37 sanctions should be no excuse for attorneys representing clients in litigation. When a violation of a court order is found by the district court to be willful and intentional, requiring a duty to warn would be a futile prolongation of the discovery process.

In one form or another, the circuit courts have accepted the "five factors" discussed in Malone for the consideration of the appropriateness of sanctions for discovery abuses.[5] There is no conflict among the

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5. See. Alvarez v. Simmons Market Research Bureau, Inc., 839 F.2d 930, 932 (2nd Cir. 1988); Smith v. United States, 834 F.2d 166, 169 (10th Cir. 1987); Anchorage Associates v. Virgin Islands Board of Tax Review, 1990 WL 200642 (3rd Cir. December 14, 1990); Searock v. Stripling, 736 F.2d 650 (11th Cir. 1984); Bank One of Cleveland, N.A. v. ABBE, 916 F.2d 1067 (6th Cir. 1990) in which the court referred to the "factors" individually:

--Whether the failure to comply was

circuits which needs to be resolved by this Court.

According to the percepts accepted in U.S. For Use of Wiltec Guam v. Kahaluu Construction 857 F.2d 600 (9th Cir. 1988), the sanctions imposed in the case at bar were warranted by the facts as perceived by the district court. In Kahaluu the court wrote at 604:

> "Finally we have held that the district court abuses its discretion if it imposes a dismissal sanction 'without first considering the impact of the sanction and the adequacy of less drastic sanc-

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> attributable to "inability" as opposed to "willful bad faith or any fault of the [witness]." Adkins v. United States, 816 F.2d 1580 (Fed.Cir. 1987);
> --Whether "the adversary was prejudiced by the dismissed party's failure to cooperate in discovery." Lolatchy v. Arthur Murray, Inc., 816 F.2d 951 (4th Cir. 1987);
> --Whether "the [sanctioned] party was worried (sic) that failure to cooperate could lead to dismissal." Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744 (5th Cir. 1987); and
> --Whether "less drastic sanctions" were considered. Founding Church of Scientology v. Webster, 802 F.2d 1448 (D.C.Cir. 1986).

> tions.' (citations omitted) ... the district court is generally required to discuss alternative sanctions; but in exceptional cases, where it is clear that no other alternative would have been reasonable, we may affirm a dismissal or default judgment despite the absence of such discussion (citations omitted).... An explicit warning is not always required, at least in a case involving 'egregious circumstances.'

It is clear from the order in the instant case that the district court considered the suitability of less drastic sanctions.[6] In its order the district court notes that Carroll intentionally and willfully failed to comply with INA's legitimate discovery requests by offering two excuses. Carroll argued first, that the doctrine of res judicata barred the relitigation of the factual issues addressed in the underlying wrongful termination case. Second, Carroll contended that the order granting INA's motion to compel was issued summarily after Carroll failed to respond to INA's motion. The court

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6. Memorandum Opinion and Order Supra. at page 23.

took exception to Carroll's unilateral decision not to respond to INA's discovery without first seeking a determination by the court as to the merits of his res judicata argument. Carroll also disregarded both court orders compelling discovery.

> [Carroll's] flagrant disregard of the Rules of Procedure and orders of this Court, combined with the serious prejudice resulting to [INA] from its delay and contumacious conduct, convince the Court that dismissal is an appropriate sanction. (citation omitted).[7]

The district court found Carroll's conduct to be willful, deliberate and "contumacious," and therefore dismissal of the complaint was appropriate.[8] The district court also found that Carroll had ample opportunity to respond to INA's motion to dismiss for failure to prosecute and that Carroll was aware that failure to comply with discovery rules and court orders could result

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7. Id. at 22.

8. Id. at 24.

in dismissal.[9] In light of Carroll's conduct an explicit warning was not required. Kahaluu at 605.

CONCLUSION

While certiorari is a vehicle for reconciling conflicting decisions of the circuit courts, certiorari should not be used to homogenize the discretionary functions of the courts. As one commentator has said:

> is both impossible to formulate a body of concrete rules concerning the imposition of discovery sanctions and unwise to do so because such standards would force unique factual situations into generalities devoid of the equitable considerations central to the discretionary function.[10]

The discretion which Judge Battin exercised in dismissing the plaintiff's complaint was not a departure from the accepted and usual course of judicial proceedings and does not call for an exercise of this Court's power of supervi-

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9. Id.

10. Note, Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37, 29 Case Western Reserve L.Rev. 603 (Spring, 1979)

sion.

For the reasons set forth in this brief, Carroll's petition for a writ of certiorari should be denied.

Respectfully submitted this 21st day of December, 1990.

Susan J. Rebeck

Susan J. Rebeck
104 Fourth Street North, Suite 301
Post Office Box 2720
Great Falls, Montana 59403-2720
(406) 727-8400

Counsel for Respondent